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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS, OF AMERICA, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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QUESTIONS PRESENTED

Section 8(e) of the Labor Management Relations Act makes it an unfair labor practice for an employer and a union to enter a contract whereby the employer agrees "to cease doing business with any other person." The "construction proviso" to § 8(e) creates an exception for certain agreements between unions and employers in the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction." In *Connell Co. v. Plumbers & Steamfitters*, 421 US 616 (1975), this Court held that a subcontractor clause which prohibited the general contractor from doing business with any subcontractor that had no labor contract with the union and which thereby organized subcontractors' employees from the top down, was prohibited by § 8(e) and not protected by the construction proviso, when the union did not represent any of the general contractor's employees on any of the general contractor's construction sites.

1. Whether the "collective bargaining relationship" between a union and a general contractor which arises when the general contractor employs a single union member for a time on a single job invokes the protection of the construction proviso for the union's use at all times on all jobs, throughout the life of the labor contract, of a secondary boycott subcontractor clause which compels unionization of workers without their consent and yet fails on most or many jobs to serve the congressional design of avoiding friction between union and nonunion workers.
2. Whether construction unions are free, because of the construction proviso to § 8(e) of the LMRA, to use secondary boycott subcontractor clauses as broad "top-down" organizing weapons in contexts where they have no redeeming virtue of avoiding jobsite friction between union and nonunion workers, simply because the clauses are agreed to in a "collective bargaining relationship" — which in practice means that the clause is applicable at all times to all jobs simply because the general contractor's union employees may either now or in the future work for at least some time on some job.
3. Whether the majority decision below is contrary to *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100*, 421 US 616 (1975), because *Connell* held a subcontractor clause to be outside the protection of the § 8(e) construction

proviso when the general contractor employed none of the union's members on any of its jobs, yet the majority below held an identical subcontractor clause to be protected by the proviso simply because it was contained in an agreement in a "collective bargaining relationship"—which means in practice that the general contractor may employ a union member on some job some time.

4. Whether *Connell's* prohibition against "allow[ing] unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing" (421 US at 633) can be eluded simply because the general contractor may employ one or more union members on some job some time and thus have a "collective bargaining relationship" with the union.

LIST OF PARTIES TO PROCEEDING BELOW

Pursuant to Rule 21.1(b) of the Rules of the Supreme Court of the United States, the following lists of the parties below is submitted. The parties in this case below (which bore Ninth Circuit Case Nos. 78-3469, 78-3487, 78-3619 and 79-7011) are the following:

1. Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.
2. Oregon-Columbia Chapter, the Associated General Contractors of America, Inc.
3. International Union of Operating Engineers, Local No. 701.
4. National Labor Relations Board.

The case below was consolidated for purposes of oral argument and decision with a case bearing Ninth Circuit Case No. 78-3468. The parties below in No. 78-3468 are:

1. Woelke & Romero Framing, Inc.
2. National Labor Relations Board.
3. Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.
4. Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes Involved	2
Statement	2
1. Facts	2
2. Effect of the subcontractor clause	2
3. Proceedings below	3
Reasons for Granting the Writ	3
1. The issue is of broad and fundamental importance throughout the construction industry, as all agree	3
2. The decision below conflicts with *Connell Co. v. Plumbers*, 421 US 616 (1975). This subcontractor clause destroys employees' self-determination rights through a group secondary boycott that organizes subcontractors' employees from the "top-down," yet the operation of the clause is not limited to close jobsite relationships where these restraints could be justified as a means of avoiding friction between union and nonunion workers	4
a. The *Connell* decision analyzed the scope of the construction proviso in terms of close jobsite relationships where friction can occur	4
b. The majority decision below is contrary to *Connell*	7
1. The majority's reliance on "peculiarities" in the construction industry is contrary to *Connell*, which involved no such analysis, and such "peculiarities" do not justify top-down organizing	8
2. The majority's reliance on legislative remarks is contrary to *Connell* which dismissed the same remarks as "bare references" and is contrary to the Ninth Circuit's own prior decisions	8
3. The majority's reliance on "immense practical problems" is baseless and is contrary to *Connell*, which confined the construction proviso's scope to its purpose	12

Page

4. The majority's decision is rooted in the mistaken belief that such a subcontractor clause is needed to protect union standards; but union standards can be protected by a union standards clause, which does not have the vice of top-down organizing 13
5. The majority's reliance on § 8(b)(7) seriously misstates the applicable law and is contrary to *Connell* 15

3. The Board's recent brief to this Court in the *Schriver* case was unconscionably misleading..... 16

TABLE OF AUTHORITIES

Cases: Page

Acco Construction Equipment, Inc. v. NLRB, 511 F2d 848 (9th Cir 1975) 6, 10, 11, 12

Associated Gen Contractors of Cal., Inc. v. NLRB, 514 F2d 433 (9th Cir 1975) 6, 10

Barker Bros. Corp. v. NLRB, 328 F2d 431 (9th Cir 1964) ... 15

Carpenters Council of Milwaukie, 196 NLRB 487 No. 60 (1972) 12

Connell Co. v. Plumbers Steamfitters, 421 US 616 (1975) *passim*

Dallas Building and Construction Trades Council v. NLRB, 396 F2d 677 10

Drivers, Salesmen, Etc., Local 695 v. NLRB, 361 F2d 547 (DC Cir 1966) 6, 11

Essex County Vic. Dist. Council of Carpenters v. N.L.R.B., 332 F2d 636 (3rd Cir 1964) 6, 11

Heavy Highway Building and Construction Teamsters Committee, 227 NLRB 269 No. 27 (1976) 13, 17

Int'l. Union of Operating Engineers, Local 542 (York County Bridge, Inc.), 216 NLRB 408 (1975) 6

Local 437, IBEW (Dimeo Construction Co.), 171 NLRB 420 (1969) 13, 17

Local 519, Journeymen v. NLRB, 416 F2d 1120 (DC Cir 1969) . 12

Long v. Floorcraft Carpet Co., 95 LRRM 3143 (D Or 1977) . 6

Long v. Pam's Carpet Service, 95 LRRM 3145 (D Or 1977) .. 6

NLRB v. Denver Building Construction Trades Council, 341 US 675 ..... 6, 13, 14, 20

NLRB v. Intern. Union of Op. Engineers, Etc., 532 F2d 902 (3rd Cir 1976) 6

NLRB v. Iron Workers (Higdon Construction Co.) 434 US 335 (1978) 8

Operating Engineers v. Neilsen Co., 92 LRRM 2861 (D Id 1975) 6

Operating Engineers Local 12 (Acco Construction Equipment, Inc.), 204 NLRB 742 (1973) 6

Operating Engineers Local Union No. 3 Etc. v. NLRB, 266 F2d 905 (DC Cir 1959) 10

St. Maurice v. NLRB, 361 US 834 (1959) 10

Page

Donald Schriver, Inc. v. NLRB, 635 F2d 859 (DC Cir 1980) 14, 16, 17, 18, 19, 20

Smitley v. NLRB, 327 F2d 351 (9th Cir 1964) 15

Teamsters Local 386 (Construction Materials Trucking), 198 NLRB No. 129 (1972) 18

Truck Drivers Union Local No. 413 v. NLRB, 334 F2d 539 (DC Cir 1964) 13, 17

Waggoner v. R. McGray, Inc., 432 F Supp 580 (CD Cal 1977) .. 6

Woodwork Manufacturers Asso. v. NLRB, 386 US 612 (1967) 5, 6, 11

Statutes:

28 USC 1254(1) 1

Labor Management Relations Act:

Section 8(b)(4)(A) 15, 18

Section 8(b)(7) ..... *passim*

Section 8(e) ..... *passim*

Section 8(f) 8

Miscellaneous:

105 Cong. Rec. (1959): 5, 9

p. 15541 5

p. 15551 5

p. 15552 5

Hot Cargo Agreements Under the National Labor Relations Act: An Analysis of Section 8(3), 38 N.Y.U.L. Rev. 97 (1963) 11

The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott, 45 Cornell L. Rev. 724 (1960) 11

1974 Labor Relations Yearbook 298 9

1976 Labor Relations Yearbook 295 19

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

OPINIONS BELOW

The opinion of the limited *en banc* panel of the court of appeals (Pet. App. A pp 1-111) has not yet been reported. The opinion of the three-judge panel of the court of appeals (Pet. App. pp 112-146) is reported at 609 F2d 1341 (1979). The decision and order of the National Labor Relations Board (Pet. App. C pp 146-186) is reported at 239 NLRB No. 43. (All references herein to "Pet. App." are to the appendix of the Petition for Writ of Certiorari filed by the Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. (No. 80-1808). That petition arises from the same judgment from which the petition here arises.)

JURISDICTION

The judgment of the court of appeals was entered and filed on April 17, 1981. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act are set forth in Pet. App. D pp 183-186.

STATEMENT

1. **Facts.** The facts are concise and stipulated. The subcontractor clause in the AGC[1]-Local 701[2] labor contract provides:

> "Employers shall not contract any work covered by this Agreement to be done at the site of the construction . . . to any person, firm or company who does not have an existing labor agreement with [Local 701] covering such work." (Pet. App. A p 5)

The clause applies at all times to all jobs of all the 200 AGC general contractors throughout the parties' geographical jurisdiction.[3]

2. **Effect of the subcontractor clause.** Since Local 701's labor contracts always require employees performing operating engineer work to join Local 701, the effect of the clause is twofold: (1) It forces all employees of subcontractors doing such work on all the subcontractors' jobs to join Local 701 regardless of their wishes, if the subcontractors are to work on any AGC job; and (2) It forces the AGC general contractors not to deal with any subcontractor that does not require all of his covered employees on all jobs to join Local 701.

By this group boycott, subcontractors whose employees have elected to be nonunion or have selected a different union, are excluded from a large portion of the construction market. Because these restraints apply even to jobs where no union members are present, the restraints do not have the purpose or effect of avoiding jobsite friction between union and nonunion workers.

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[1] "AGC" is the Oregon-Columbia Chapter, Associated General Contractors of America, Inc. It represents about 200 general contractors for whom it negotiates labor contracts with various unions, including Local 701 (Pet. App. A p 4).

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, the following list of all parent companies, subsidiaries and affiliates of AGC is provided: 1. Associated General Contractors of America; 2. Contractors Resource Corporation.

[2] "Local 701" is Local 701 of the International Union of Operating Engineers.

[3] The geographical jurisdiction of Local 701 and of the AGC-701 labor contract is the entire state of Oregon and the 5½ counties of Southwest Washington (Pet. App. A p 4).

3. **Proceedings below.** The NLRB held that although this clause is within the general proscription of § 8(e) of the LMRA because it is a secondary boycott, it is nevertheless lawful because protected by the construction proviso to § 8(e).[4] The Court of Appeals for the Ninth Circuit, which had jurisdiction to review the NLRB's decision under 29USC § 160(e), first disagreed with the Board; a unanimous panel held the clause to be outside the construction proviso because it is not within the proviso's purpose of avoiding jobsite friction (Pet. App. B pp 112-146; reported at 609 F2d 1341). The case was reheard by a partial *en banc* panel of the Court of Appeals (Pet. App. A pp 1-111); seven judges agreed with the Board, holding that the proviso protects any clause agreed to in a "collective bargaining relationship" even though it permits top-down organizing without avoiding jobsite friction; four dissenting judges agreed with the prior panel. Of the 13 judges hearing the case, 7 found the clause within the proviso's protection, 6 found it outside the proviso and illegal.[5]

REASONS FOR GRANTING THE WRIT

1. The issue is of broad and fundamental importance throughout the construction industry, as all agree.

There can be no doubt of the importance of this issue. The Board recognized it, devoting an unprecedented day-long oral argument to it. The Court of Appeals recognized it by not only granting rehearing *en banc* but explicitly stating it to be "important" at the outset of its *en banc* decision (Pet. App. A p 3). Many union and employer groups filed amicus briefs.

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[4] Section 8(e) and its construction proviso state:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . . "

[5] One of the 11 judges on the partial *en banc* panel was also on the three-judge panel.

Indeed, it is difficult to conceive of a more continuously active and broadly important issue in the construction industry. Whether unions can require general contractors to deal only with subcontractors acceptable to those unions affects hundreds of thousands of transactions daily throughout the industry—directly affecting the job rights of countless employees and the business relations of virtually every employer in the industry.

If the decision below is accepted as the law, then all subcontractors' employees are fair game for top-down organizing. Unions can exclude all nonunion subcontractors from the market by simply requiring such a subcontractor clause in their labor contracts with general contractors. Employees of all subcontractors who work for signatory general contractors must join the union even though there is no possibility of any jobsite friction between them and the union's members.

The sole function of this form of subcontractor clause on jobs where, as commonly occurs, no union-nonunion friction is possible, is to force union representation upon employees without their consent—to organize them from the top down. This broad and egregious top-down organizing impact is not disputed. The sole issue is whether the construction proviso's purpose, and therefore its effect, is to immunize construction unions from the prohibitions against such restraints.

2. **The decision below conflicts with *Connell Co.* v. *Plumbers*, 421 US 616 (1975). This subcontractor clause destroys employees' self-determination rights through a group secondary boycott that organizes subcontractors' employees from the "top-down," yet the operation of the clause is not limited to close jobsite relationships where these restraints could be justified as a means of avoiding friction between union and nonunion workers.**

a. **The *Connell* decision analyzed the scope of the construction proviso in terms of close jobsite relationships where friction can occur.** In *Connell* this Court held a virtually identical subcontractor clause[6] to be unprotected by the proviso and illegal. Just as here, the subcontractor agreement was between a general contractor (Connell) and a union; and just as here, the agreement prohibited the

[6] The subcontractor clause in *Connell* stated "that (if) the contractor should subcontract any of the [covered work] ... said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 ... " (421 US at 620).

general contractor from doing business with any subcontractor that had no labor contract with the union. And just as here, the effect of the clause was to force union representation upon subcontractors' employees without their consent—to organize them from the top down.

The Board and the majority of the court below held that such a subcontractor clause becomes lawful and enforceable at *all* times on *all* jobs of the general contractor simply because the union represents at least one of the general contractor's employees at some time on some job—or at least claims to represent such an employee on a present or future job. According to the Board and the majority below, such facts cause the existence of a "collective bargaining relationship" and by this label they would immunize the restraints on employee and employer rights. And this is so even though the effect of the clause is identical in all respects to the illegal *Connell* clause on all jobs where none of the union's members are present.

Connell's analysis when it held such a clause illegal, was as follows: *Connell* stated that a "major aim" of the 1959 Congress, which enacted the proviso, was to prohibit precisely such top-down organizing. The proviso is an exception to this prohibition. *Connell* defined the scope of that exception in terms of the Congressional policies underlying the proviso. The Court noted that Congress' discussion of the construction proviso "focused on ... the close relationship between contractors and subcontractors at the jobsite", citing portions of the Congressional Record which described "single jobsite[s]" "where all the men are employed on the same project ... [where] they work side by side."[7] *Connell* noted this Court's prior statement that the proviso was "'designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there'"[8] and quoted with favor a court of appeals decision that "'[T]he purpose of the Section 8(e) proviso was to alleviate the friction that may arise when union men work continuously alongside

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[7] 421 US at 629-630, citations in footnote 9; quotations from Representative Thompson and Udall (105 Congr Rec 15541) and memorandum by Sen Elliott (Id. at 15551-15552).

[8] Id at 630, quoting from *Woodwork Manufacturers Asso. v. NLRB*, 386 US at 638-639.

nonunion men on the same construction site.'"[9] *Connell* stated that the proviso "seems ... to have been adopted as a partial substitute for an attempt to overrule this Court's decision in *NLRB v. Denver Building Construction Trades Council*, 341 US 675" (Id at 629), and referred (Id at 630) to the brief dissent of Justice Douglas in *Denver* where he stated:

> " ... All the union asked was that union men not be compelled to work alongside nonunion men on the same job ... " (341 US at 692).

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[9] Ibid, quoting from *Drivers, Salesmen, Etc., Local 695 v. NLRB*, 61 F2d 547, 553 (D.C. Cir 1966). The same statement has been made by other courts and the Board: *Acco Construction Equipment, Inc. v. N.L.R.B.*, 511 F2d 848, 851 (9th Cir 1975) (quoting with approval the above language and " ... what is analytically fundamental to the proviso is whether union and nonunion laborers will be required to work together for more than brief periods of time"); *Associated Gen. Contractors of Cal., Inc. v. N.L.R.B.*, 514 F2d 433, 439 (9th Cir 1975) ("The construction industry proviso was designed to enable employers and unions to prevent friction between union and nonunion employees on the same jobsite."); *Essex County Vic. Dist. Coun. of Carpenters, Etc. v. N.L.R.B.*, 332 F2d 636, 640 (3rd Cir 1964) (the proviso was enacted " ... in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside nonunion men on the same project ... ") (cited with approval on this point in *Woodwork Manufacturers Asso. v. NLRB*, 386 US 612, 639, n. 32 (1967)); *N.L.R.B. v. Intern. Union of Op. Engineers, Etc.*, 532 F2d 902, 907 (3rd Cir 1976) (the "rationale" of the proviso is " ... eliminating friction between union and nonunion workers on a jobsite ... "); *Operating Engineers Local 12 (Acco Construction Equipment, Inc.)*, 204 NLRB 742, 752 (1973), enf'd 511 F2d 848 (9th Cir 1975) (" ... the 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite ... "); *Operating Engineers v. Neilsen Co.*, 92 LRRM 2861, 2863 (D Id 1975) (the proviso "was designed to alleviate the frictions which arise at a construction site when union men work alongside nonunion men"); *Long v. Floorcraft Carpet Co.*, 95 LRRM 3143, 3144 (D Or 1977) (" ... 'the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work *continuously* alongside non-union men on the same construction site,' ... " quoting with approval from *Acco, supra*, at 851 (Emphasis in original)); *Long v. Pam's Carpet Service*, 95 LRRM 3145, 3146 (D Or 1977) (quoting the same language quoted in *Long v. Floorcraft, supra); Waggoner v. R. McGray, Inc.*, 432 F Supp 580, 583 (CD Cal 1977), rev'd on other grounds, 607 F2d 1227 (9th Cir 1980) (quoting from *Acco* the same language quoted in the *Long* cases, *supra*); *Intl. Union of Operating Engineers, Local 542 (York County Bridge, Inc.)*, 216 NLRB 408, 409, 88 LRRM 1405, 1407 (1975), enf'd 532 F2d 902 (3rd Cir 1976) (" ... the 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite ... ").

Connell explicitly observed that in the § 8(e) proviso

> " ... Congress did not ... indicate that [construction unions] were free to use subcontracting agreements as a broad organizational weapon ... " (Id at 630).

Connell then applied "these policies" to the subcontracting agreement before it (Id at 631). It found the agreement "not ... related to any of these policies" (Ibid). The agreement "was not designed to protect the union's members" from "having to work alongside nonunion men ... since it was not limited to jobsites on which they were working" (Ibid). *Connell* observed that

> "One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees" (Id at 632, footnotes omitted);

and that Congress enacted "careful safeguards preserving workers' rights to decline union representation" (Ibid). The final paragraph of *Connell's* analysis of this point begins:

> "These careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing ... (Id at 633).

Since the subcontractor clause before it was not within the proviso's purpose, *Connell* held it not within the proviso and illegal under § 8(e).

The union in *Connell* did not represent any of Connell's employees on any of its jobs. Because of this no "collective bargaining relationship" existed between Connell and the union. However, the decisive factor in *Connell's* analysis was not the absence of a "collective bargaining relationship" but the absence of the union members on the jobsite; what made the absence of a "collective bargaining relationship" meaningful was the absence of the union's members on the jobsite. The close side-by-side relationship did not exist. Without even the possibility of a union member's presence on the site, there was no hazard of the union-nonunion friction which prompted enactment of the proviso and thus no reason to tolerate the violation of workers' rights to decline union representation.

b. **The majority decision below is contrary to Connell.** The majority decision below is fundamentally inconsistent with *Connell* for the reasons that follow:

1. **The majority's reliance on "peculiarities" in the construction industry is contrary to *Connell*, which involved no such analysis, and such "peculiarities" do not justify top-down organizing.** The majority found support for its decision in "peculiarities of the construction industry" (Pet.App.A p 19). These "peculiarities" were described as short job duration causing "difficulties of organizing" and difficulty in "maintaining wage and benefit standards" for unions, and the employers' need for a "ready source of skilled workers" and ability to "forecast labor costs" (Pet. App. A p 20). But in its thorough analysis of the proviso *Connell* had no occasion to examine these characteristics. Nor do any of these characteristics warrant the gross intrusion on employee rights of free choice brought about by this clause. "Wage and benefit standards" can be maintained without forced unionization by simply using a union standards subcontractor clause (see discussion below). Employers' needs for skilled workers and forecasting labor costs can be satisfied by their voluntary use of union sources. Forced top-down organizing is not required to serve these needs.

In another construction industry case, *NLRB v. Iron Workers (Higdon Construction Co.)*, 434 US 335 (1978), this Court analyzed "aspects peculiar to the building trades" perceived by the 1959 Congress (434 US at 348), a list nearly identical to the "peculiarities" discussed by the majority below. In stark contrast to the majority below, however, *Higdon* concluded that Congress' perception of these characteristics did *not* evidence an intent to tolerate top-down organizing; on the contrary, *Higdon* stressed that "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry ... " (434 US at 347-348).[10]

2. **The majority's reliance on legislative remarks is contrary to *Connell*, which dismissed the same remarks as "bare references" and is contrary to the Ninth Circuit's own prior decisions.** The majority ruling below relies on 1959 legislative remarks to the effect that the proviso was intended to preserve the existing-pattern of collective bargaining and was not intended to change existing law.

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[10] Consistent with this view of the legislative history, *Higdon* ruled that a minority construction union which signs a "prehire contract", lawful under § 8(f), is forbidden by § 8(b)(7) to picket to enforce that contract.

But these identical remarks were cited and dismissed in *Connell* as "bare references" (421 US at 628).[11]

Even if the majority below were correct in resting its decision on legislative statements which *Connell* dismissed, those statements cannot, consistent with the holding in *Connell*, support the legality of the clause here. Every legislative statement which the majority construes to support the legality of the clause here is equally supportive of the legality of the clause in *Connell*. The majority's reasoning is thus in direct conflict with *Connell*.

The majority relies on Senator Kennedy's statement that the proviso was "necessary to avoid serious damage to the pattern of collective bargaining [in the construction industry]" (Pet. App. A p 28). Since "some such union signatory agreements existed [in 1959]" (Pet. App. A p 34), the majority states, Kennedy's statement requires that such clauses be legal under the proviso. The majority does not even consider whether "some" clauses of the type disapproved in *Connell* also existed in 1959. In fact, the Board's General Counsel has determined that such clauses were "commonplace" in 1959. In an opinion issued in 1974 the General Counsel stated that "both prior to and subsequent to the 1959 amendments" agreements in the construction industry "containing little more than subcontracting provisions" and "not [in a] conventional collective bargaining relationship" were "commonplace."[12] Thus, since there were at least "some" subcontractor

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[11] The comments in the Congressional Record show by their own language that it was assumed that the employees were working side-by-side on the same jobsite. A thorough review of the Congressional Record shows no assertion that subcontractor clauses were thought to be lawfully applicable where no side-by-side relation existed. On the contrary, it was the very existence of that side-by-side relationship that was said to justify the proviso.

[12] 1974 Labor Relations Yearbook (BNA 1975) 298, 307. The full text of the General Counsel's statement on this question is as follows:

" . . . organizing in the building and construction industry both prior to and subsequent to the 1959 amendments, was and is primarily carried on by building and construction trades councils on behalf of their constituent craft locals. The building trades agreements proferred are not conventional collective-bargaining agreements, nor is a conventional collective-bargaining relationship sought, but rather an attempt is made to obtain skeleton agreements (containing little more than subcontracting provisions) which in turn are augmented by the execution of collective-bargaining agreements by the individual trade unions, the latter agreements containing provisions

(footnote continued next page)

clauses *outside* a "collective bargaining relationship" in 1959, just as there were at least "some" subcontractor clauses *in* a "collective bargaining relationship" in 1959, by the majority's logic, the *Connell* clause should have been just as legal as the clause here.

The majority also seeks support in 1959 legislative statements that the proviso was "intended to preserve the present state of the law" (Pet. App. A p 29). It cites *Operating Engineers Local Union No. 3, Etc., v. NLRB*, 266 F2d 905 (DC Cir 1959), cert denied sub nom *St. Maurice v. NLRB*, 361 US 834 (1959), for the proposition that union signatory clauses were legal in 1959 (Pet. App. A p 32). But the majority makes no inquiry whether union signatory clauses not in a "collective bargaining relationship" were also legal in 1959. The very *Operating Engineers* decision on which the majority relies indicates that union signatory clauses were lawful regardless of whether or not a collective bargaining relationship is present. Nothing in the logic or authority underlying the holding in that case suggests that the presence or absence of a collective bargaining relationship has any bearing on the outcome. If, as the majority urges, that case represents "existing law" in 1959, then the existing law was that union signatory clauses are lawful whether or not a collective bargaining relationship exists.

In sum, the majority's reliance on the legislative statements eschewed in *Connell* leads to a result in this case which is in irreconcilable conflict with *Connell*. A decision such as this which is on a subject of this importance and which is at such variance with the law as determined by this Court should not be allowed to stand.

The majority's view of the legislative history of the proviso is also contrary to the Ninth Circuit's own prior decision in *Acco Construction Equipment, Inc. v. NLRB*, 511 F2d 848 (9th Cir 1975).[13] That case held:

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governing wages and other substantive conditions of employment. As the Court observed in *Dallas Building and Construction Trades Council v. N.L.R.B.*, 396 F.2d 677, 68 LRRM 2019 (C.A. D.C.), at p. 682:

"' . . . Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry; and in 1959 "umbrella" agreements like the one proposed here were, as they are today, commonplace, for collective-bargaining is traditionally conducted at several levels in the construction industry . . . '"

[13] It is also contrary to the Ninth Circuit's decision in *Associated Gen. Contractors of Cal., Inc. v. NLRB*, 514 F2d 433, 439 (9th Cir 1975), which followed *Acco*.

" . . . Although the legislative history of the proviso is ofttimes vague and inconclusive, what does emerge is an underlying congressional concern with minimizing jobsite tension. In contrast to most other industries, a variety of craftsmen employed by different contractors and subcontractors work continuously side by side on construction projects. Where the employees of some are union members and the employees of others are not, there is a potential, or so Congress believed, for jobsite conflict. Hence, 'the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men *work continuously* alongside nonunion men on the same construction site.' Drivers, Salesmen, Etc., Local 695 v. NLRB, 124 U.S. App. D.C. 93, 361 F.2d 547, 553 (1966) (emphasis added).[7] What appears critical is that the potential for conflict is likely to arise only when the non-union laborers are in frequent and relatively close contact with the union craftsmen.[8]

"7. See Essex County & Vic. Dist. Council of Carpenters v. N.L.R.B., 332 F.2d 636, 640 (3rd Cir. 1964) ('This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project.'); Note, Hot Cargo Agreements Under the National Labor Relations Act: An Analysis of Section 8(e), 38 N.Y.U.L. Rev. 97, 110-11 (1963); cf. Comment, The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott, 45 Cornell L. Rev. 724, 753 (1960).

"8. . . . What is analytically fundamental to the proviso is whether union and non-union laborers will be required to work together for more than brief periods of time." (511 F2d at 851) (Emphasis in original) [14]

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[14] The majority concedes that "ACCO [sic] does contain language tending to restrict the jobsite proviso to the goals of avoiding shoulder-to-shoulder friction" (Pet. App. A p 89). It seeks to distinguish *Acco* on the ground that the workers were "essentially off-site workers" so were "not at all involved in the 'community of interests' which were emphasized in *National Woodwork, Connell*, and this opinion" (Ibid). However, *Acco* does not rest on such an alleged distinction. Rather, it reasons directly from the proviso's purpose of avoiding jobsite friction and finds the subcontractor clause outside the proviso because outside that purpose.

The significance of the *Acco* ruling was properly recognized in the dissent below: "As *Connell* and *Acco* concluded, the legislative history supports the conclusion that most congressmen thought the proviso was intended to address the problem of jobsite friction" (Pet. App. A p 102). Similarly, the three-judge panel below stated: "Thus, the purpose of the proviso was to permit unions and construction employees to avoid the tension and discontent that exists when members of a union are required to work on the same jobsite with nonunion workers of the same craft or trade" (Pet. App. A pp 136-137).

3. **The majority's reliance on "immense practical problems" is baseless and is contrary to *Connell*, which confined the construction proviso's scope to its purpose.** The argument of the majority below that "immense practical problems" (Pet. App. A p 59) attend the ruling of the three-judge panel is baseless. The majority suggests that subcontracting agreements limited to sites where union employees are present (and where union-nonunion friction can therefore occur) may require separate negotiation for each jobsite (Pet. App. A pp 59-60). But there is nothing in the jobsite-friction rule that would necessitate such repeated negotiations. As the majority itself recognizes (Pet. App. A p 60) a single agreement can be negotiated which applies to every job where union-nonunion friction is a possibility.

The contention that "enforcement problems" of such a clause "remain severe" (Pet. App. A p 60) ignores decades of experience under the NLRB's rule for common-situs secondary boycotts. That rule permits a union to picket a construction jobsite only when employees of the primary employer are on the jobsite.[15] The test of legality based on the jobsite presence of particular employees is thus commonplace in the construction industry and is no more difficult to apply in determining the legality of enforcing a subcontractor clause than in determining the legality of a picket line.

Nor is there anything in *Connell* which remotely suggests that the scope of the construction proviso is to be determined by alleged practical problems in carrying out its purpose.

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[15] *Carpenters Council of Milwaukie*, 196 NLRB 487, 490, No. 60 (1972); *Local 519, Journeymen v. NLRB*, 416 F2d 1120, 1124-1126 (DC Cir 1969).

4. **The majority's decision is rooted in the mistaken belief that such a subcontractor clause is needed to protect union standards; but union standards can be protected by a union standards clause, which does not have the vice of top-down organizing.** The majority's opinion below does reach jobsite considerations, and this is the core of its decision and the nub of its error. It is also the nub of its conflict with *Connell*. Stripped of its lengthy garb, the majority's opinion finds the restraints of the subcontractor clause justified by the union's need for "maintaining wage levels [and] protecting benefits" (Pet. App. A p 42). The majority reasons that because of the close proximity of jobsite employees the "working conditions applicable to one set of workers may very well affect others working on the same project" and, therefore (the majority holds), protecting these interests outweighs the evils of the top-down organizing and employer boycotts (Id at 46).[16]

But the majority overlooks that these interests can be protected just as effectively by a "union standards" clause, which requires all subcontractors to adhere to union standards. It is settled that such clauses are lawful and, because they are primary, are not prohibited by § 8(e) and require no proviso protection.[17] Because union standards clauses do not require the subcontractor to sign a union contract, the rights of free choice of the subcontractor's employees are fully preserved at the same time that the unions' standards are

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[16] The majority labels these interests "primary" and considers this an approbation engendering special privilege. But the majority thereby runs headlong against the established law (without discussing it, or apparently even being aware of it since no party made such an argument) that the mere presence of lawful "primary" motives does not legalize an otherwise unlawful "secondary" motive (e.g., *NLRB v. Denver Bldg. Constr. Tr. Council*, 341 U.S. 675, 688-689 (1951). Passing through these labels, the basic point is that the interest of protecting union standards is found to outweigh the rights of subcontractors' employees to be free from top down organizing and the rights of the contractors to do business with whom they choose.

[17] *Truck Drivers Union Local No. 413 v. NLRB*, 334 F2d 539, 548, 55 LRRM 2878, 2884 (D.C. Cir 1964), cert den 379 US 916 (1964); *Heavy Highway Building and Construction Teamsters Committee*, 227 NLRB 269, 272, No. 27 (1976) ("[C]ontract clauses designed to limit subcontracting of unit work to employers who maintain the same standards of employment, thus minimizing the economic incentive to subcontract, so-called union standard clauses, are lawful. The underlying rationale for the lawful character of . . . union standard clauses is . . . to insure that negotiated standards will not be undermined."); *Local 437, IBEW (Dimeo Construction Co.)*, 171 NLRB 420, 421 (1969).

protected. As stated in the dissent below: "This problem, however, is resolved by a common, *primary* restraint: the union standards clause. Such clauses effectively insulate workers from falling industry standards by removing the incentive to subcontract. At the same time they avoid many of the evils inherent in the restraints here." (Pet. App. A p. 110).

Since the protection of these jobsite interests can be achieved without forcing the top-down organizing of subcontractor's employees through boycotts, it follows that such interests cannot justify either the boycotts or their resulting top-down organizing—and such top-down organizing is thereby shown to be the real objective of this subcontractor clause.[18]

Connell recognized these points and is fundamentally contrary to the majority decision below. *Connell* did not seek justification in maintaining wage and benefit levels. The "close relationship between contractors and subcontractors at the jobsite" which *Connell* described (421 US at 629-630), was not fashioned in such terms or rooted in such considerations. Rather, *Connell* repeatedly referred to "'frictions that may arise when union men work continuously alongside nonunion men on the same construction site'" (421 US at 630), and to whether "Connell's employees [had] to work alongside nonunion men" (Id at 631), and to the Congressional Record which referred to the "same project ... [where] they work side by side" (Id at 630), and to Justice Douglas' *Denver* dissent which objected that "union men [should] not be compelled to work alongside nonunion men on the same job" (Ibid).

In short, the core of the reasoning of the majority below is in conflict with *Connell*. For nowhere does *Connell* frame the inquiry in terms of balancing *a policy of maintaining union standards* against employees' right of free choice—as did the majority below. Rather, *Connell* balanced the *policy of avoiding jobsite friction* against freedom from top-down organizing; or, more precisely, *Connell* found that Congress had struck that balance.

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[18] The majority below (at Pet. App. A p 87, n. 31) relies on *Donald Schriver, Inc. v. NLRB*, 635 F2d 859 (D.C. Cir 1980) on this point. This is, indeed, the central justification proposed by the *Schriver* opinion, which is in error for the same reason.

5. The majority's reliance on § 8(b)(7) seriously misstates the applicable law and is contrary to *Connell*. The majority below seeks to support its conclusion by stating that *Connell* is a narrow ruling which simply fills a "gap" in § 8(b)(7). The majority reasons that, since the union in *Connell* disclaimed any interest in organizing or representing Connell's employees, its picketing was not limited by § 8(b)(7), so would have been unlimited if the subcontractor clause had not been found outside the construction proviso.[19] "The situation is quite different", the majority reasons, "when a union seeks a subcontractor clause in the context of a collective bargaining relationship. In that situation the union's coercive force is limited" (Pet. App. A pp 56-57).

This is wrong; and it is, again, contrary to *Connell*. A union which seeks a subcontractor clause in the context of a "collective bargaining relationship" can exert the same unlimited coercive force which *Connell* found unlawful.

Indeed, under settled law, Section 8(b)(7) has no significant bearing on the union's right to picket when a contractor declines to sign a subcontractor clause. It is settled law that even a union which does *not* represent an employer's employees can nevertheless, without violating § 8(b)(7) (or any other law), engage in informational picketing, indefinitely, to publicize the fact that the employer has no contract with the union. Such "informational" picketing is not prohibited by § 8(b)(7) and is lawful even if its ultimate objective is to force the employer to recognize and bargain with the union.[20] Furthermore, the union can lawfully decline to sign any contract that does not contain whatever form of subcontractor clause the union can lawfully require. Therefore, if the decision of the majority below stands, a "stranger" union may picket any unorganized employer indefinitely to inform the public that the employer has no contract with the union until the employer signs a contract containing this subcontractor clause.

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[19] Since the clause therefore violated § 8(e), the picketing in *Connell* was limited by § 8(b)(4)(A), which prohibits picketing to secure a clause which violates § 8(e).

[20] *Smitley v. NLRB*, 327 F2d 351, 352, 353 (9th Cir 1964) (Picketing held not to violate § 8(b)(7) even though "an object of the picketing was to secure recognition;" the court said: " ... This is normally the ultimate objective of any union in relation to an employer who has employees whose jobs fall within the categories of employment that are within the jurisdiction of the union ... "); *Barker Bros. Corp. v. NLRB*, 328 F2d 431 (9)th Cir 1964); and cases cited therein.

A union which represents the employees of an employer can exert the same unlimited force upon that employer, and can do so without any need to disclaim an immediate organizational objective. Such a union is wholly free of the restraints of § 8(b)(7).[21] The union can lawfully refuse to sign any contract with the employer and continue picketing indefinitely until the employer agrees to a contract containing the subcontractor clause.

Thus, the ruling of the majority below produces a result that openly defies *Connell*. The majority's rule permits the union to secure this top-down organizing subcontractor clause, which *cannot* be justified as a means of avoiding jobsite friction (since no such friction is possible in the absence of union employees on the jobsite), and which *cannot* be justified as needed to maintain union standards (since union standards can be maintained by a lawful union standards clause), and which can be secured by perpetual picketing of any general contractor vulnerable to picketing. This is precisely the basic evil outlawed by *Connell*, which concluded:

> "These careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing . . . " (421 US at 633)

3. The Board's recent brief to this Court in the Schriver case was unconscionably misleading.

The Board will doubtless oppose this petition, arguing in part that the Court's recent denial of certiorari in *Donald Schriver, Inc.* v. *N.L.R.B.*, 635 F2d 859 (DC Cir 1980), cert den _____ US _____ (May 1, 1981) (Supreme Court docket No. 80-1257), should also dispose of this case. However, a review of the Board's Brief In Opposition in *Shriver* reveals many serious errors which could have misled this Court when certiorari was there denied. We note them here to allow the Board full opportunity to respond.

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[21] Section 8 (b)(7) does not apply to a union which is the bargaining representative of the employer's employees.

The Board concedes the issue is important (Board's brief in Opposition in *Schriver* p 12). But it nevertheless argues against review because, it says, the decision below is correct and not inconsistent with ultimate rulings by other circuits (Ibid.). Although the latter point is technically accurate, the Ninth Circuit's original panel herein held to the contrary, and 6 out of the 13 judges eventually hearing this case below ruled to the contrary.

The Board's argument that the majority's decision below is correct contains many of that decision's own errors. However, to the extent these errors rest on a basic misunderstanding of elemental labor law (as most of them do) these errors are much more egregious for the Board, since the Board purports to hold out objective expertise in labor matters. Several of the most serious errors of the Board will be noted:

1. The Board's description of *Connell* in the Board's *Schriver* brief is not so much a description as a conclusionary assertion of the Board's own view of what it wants *Connell* to mean (Board's Brief in Opposition in *Schriver* pp 14, 17, 22). Nowhere does the Board review *Connell's* logic. Nowhere does the Board examine with any thoroughness *Connell's* examination of the proviso's purpose. The Board simply extracts one or two sentences (or mere portions of sentences) from their context, and then asserts the Board's own view that *Connell* means that broad subcontractor clauses are lawful whenever they are in a "collective bargaining relationship."

The Board presents no candid discussion of the broad top-down organizing which thereby results, even though in a vast multitude of cases no redeeming virtue can exist since no close jobsite relationship exists.

2. The central argument of the Board in *Schriver* was that "subcontracting agreements serve a much broader and more fundamental purpose [than avoiding jobsite friction]— i.e., protection of 'contract standards in the construction industry, a goal that would be unattainable in that industry if subcontracting agreements (of the type here) were not allowed'" (Board's brief in opposition in *Schriver,* pp 20-21, quoting *Schriver).* We respectfully submit that such a representation by the Board is unconscionable. Any union contract standard involving any economic benefit can be lawfully protected by a primary union standards subcontractor

clause that does not even fall within the prohibition of § 8(e). As discussed above, this elementary rule has been repeatedly confirmed by the Board,[22] and by the courts.[23]

It is thus clear beyond dispute that, directly contrary to the Board's representation to this Court in *Schriver*, this type of subcontractor clause is not needed to protect union economic standards.

It is true that noneconomic provisions do not fall within the lawful protection of a union standards clause.[24] However, neither the majority below, nor the court in *Schriver*, nor the Board in its *Schriver* brief bases the justification for top-down organizing on the need to protect *non*economic contract standards. On the contrary, the majority below explicitly relied on "maintaining wage levels [and] protecting benefits such as pensions and paid vacations"—all of which are *economic* standards (Pet. App. A p 42); and both the *Schriver* court and the Board in its subsequent brief to this Court speak generally of "contract standards" which clearly encompass economic provisions as their principal elements.

If the Board seeks to justify the top-down organizing inherent in this subcontractor clause by its protection of union *non*economic standards then, at the least, the Board should say so. It should not represent to this Court, as it did in *Schriver*, that protection of *all* contract standards "would be unattainable" if subcontracting agreements "of the type here" were not allowed. This is utterly false. The Board in its own decision gave no such reason. Such dissembling to this Court is beneath the dignity of the Board—even as an expedient to protect its own strained and shakey decision.

3. The Board dissembled further in its argument in *Schriver* concerning § 8(b)(7) (Board's Brief in Opposition in *Schriver* pp 14-15). It argued, in effect, that the purpose of the *Connell* ruling was simply to fill a narrow "gap" in § 8(b)(7). It argued, in effect, that the *Connell* decision was caused by the inapplicability of § 8(b)(7)'s time limitations to Local 100's nonorganizational picketing of *Connell* (so, the Board argued, Local 100 could have

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[22] *Local 437, IBEW (Dimeo Construction Co.)*, 171 NLRB 420, 421 (1969); *Heavy Highway Building and Construction Teamsters Committee*, 227 NLRB 269, 272, No. 27 (1976).

[23] *Truck Drivers Union Local No. 413, Etc. v. NLRB*, 334 F2d 539, 548 (DC Cir 1964), cert denied 379 US 916 (1964).

[24] *Teamsters, Local 386 (Construction Materials Trucking)*, 198 NLRB No. 129, 81 LRRM 1109, 1110 (1972).

continued picketing indefinitely if *Connell* had not found the clause outside the proviso and therefore within § 8(e)'s prohibitions and therefore within § 8(b)(4)(A)'s prohibitions against picketing to secure a contract that violates § 8(e)); whereas (the Board argued) picketing to secure a subcontractor clause in a "collective bargaining relationship" is limited by § 8(b)(7) so there is no need to have § 8(e) apply and so *Connell* is inapplicable here (Ibid). We have already shown (above) that the law is to the contrary and that *Connell* contains no such analysis. The point here is that the Board, in its expertise, is fully aware of this. Yet the Board presented this argument to this Court. The *Schriver* court made such an assertion in its long and argumentative opinion, and the majority below erroneously followed. But this does not justify the Board, with its full expert knowledge, in misrepresenting the established law to this Court.

4. The Board argued in *Schriver* that the legislative history "makes it clear" that the purpose of the proviso was not to avoid jobsite friction but to preserve the "pattern of bargaining" in the construction industry (Board's Brief in in Opposition in *Schriver* p 20). But the Board's own General Counsel has previously found that there was no "pattern of bargaining" in the construction industry,[25] and explicitly criticized the very study (by Lunden) now resurrected and relied on by the Board on this point.[26] Furthermore, *Connell* dismissed these legislative remarks as "bare references" (422 US at 628), and its analysis of the proviso's purpose disregards them. As previously shown, there is extensive authority— including statements of the Board itself—that the purpose of the proviso was to avoid jobsite friction (see note 9, supra). For the Board to now argue that the legislative history "makes it clear" to the contrary is again, and at best, a misleading statement to this Court.

5. Finally, the Board asserts "'it is simply not feasible for employers and unions in the construction industry to renegotiate agreements on each jobsite'"—again borrowing from *Schriver*

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[25] 1976 Lab Rel Yearbook (BNA 1977) 295, 309; 93 Lab Rel Reporter 390, 404.

[26] The General Counsel stated that the Lunden study was "inconclusive" and added:

"[T]he only clear lesson that emerges is simply that there was no uniformity in the subcontracting clauses that existed in the construction industry at the time. If the term 'pattern of collective bargaining' means a uniform practice in the industry, it would appear that there was no such pattern" (1976 Lab Rel Yearbook (BNA 1977) 295, 309).

(Board's Brief in Opposition in *Schriver* p 21). As previously noted, this argument is baseless and the Board in its expertise must know it. No party herein has suggested that separate agreements need be bargained for each jobsite. And this is so regardless of the form of the subcontractor clause. All that is sought is a subcontractor clause which is limited to jobs where friction can occur; or, in Justice Douglas' phraseology, a subcontractor clause under which "union men [will] not be compelled to work alongside nonunion men on the same job" (dissent in *Denver,* 341 US at 692).

6. Nowhere in its brief to this Court in the *Schriver* case did the Board candidly face the simple central issue in this case, which is: Does the proviso's purpose justify the broad top-down organizing of these clauses which are applicable at all times to all jobs, simply because the union represents (or claims to represent) one or more of the general contractor's employees on some job at some time? Yet it is *this* issue which is fundamental and which this Court should decide.

CONCLUSION

This petition for a writ of certiorari should be issued to review the judgment of the U. S. Court of Appeals for the Ninth Circuit in this matter.

Respectfully submitted,
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Nos. 80-1801 and 81-91

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80-1808 IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED CONTRACTORS OF AMERICA, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF OF PETITIONER OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

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TABLE OF CONTENTS

Page

1. Complete protection of union wages and benefits can be accomplished by a primary union standards clause, without need for a subcontractor clause that forces subcontractors' employees to join the union regardless of their wishes 2
2. The jobsite friction rule does not require jobsite-by-jobsite negotiation of labor contracts and is readily administered under familiar NLRB principles 4
3. The Board's "pattern of bargaining" argument is contrary to *Connell* 5
4. *Connell* is not a mere plug in a "loophole" in § 8(b)(7) but a bar to all top-down-organizing subcontractor clauses 6

TABLE OF AUTHORITIES

Page

Cases:

Carpenters' Council of Milwaukie, 196 NLRB 487, 490, No. 60 (1972) 6

Connell Co. v. Plumbers Steamfitters, 421 US 616 (1975) 2,5,6,7,8,9

Donald Shriver, Inc. v. NLRB, 635 F2d 859 (D.C. Cir 1980), cert den _____ US _____ (May 1, 1981) (Supreme Court Docket No. 80-1257) 2,3,5,9

Local U. No. 519, United Ass'n of J. A. of Plumb., Etc. v. NLRB, 416 F2d 1120, 1124-1126 (D.C. Cir 1969) 6

Statutes:

Labor Management Relations Act:

Section 7 4,5

Section 8(a)(3) 4

Section 8(b)(4)(A) 8

Section 8(b)(7) 2,7,8

Section 8(e) 2,4,7,8

IN THE

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OCTOBER TERM, 1981

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,

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v.

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No. 81-91

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REPLY BRIEF OF PETITIONER OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

ARGUMENT

This brief responds to the Brief For The National Labor Relations Board In Opposition filed in No. 80-1808 and relied on by the Board as its brief in opposition in No. 81-91.

The Board's brief simply repeats in summary form the four principal arguments made in its brief in opposition to the certiorari petition in the *Shriver* case:[1] (1) that union signatory subcontractor clauses are proviso-protected because they are needed in the construction industry for "maintaining wage levels" and "protecting benefits" (Board br 8); (2) that "immense practical problems" would attend a rule that confined union signatory clauses to circumstances where jobsite friction could arise (Board br 9); (3) that the § 8(e) proviso was "intended to preserve the pattern of collective bargaining" in existence in 1959 (Board br 7); and (4) that *Connell*[2] merely fills a "loophole" in § 8(b)(7), which would otherwise permit unlimited picketing, and so *Connell* does not apply when a "collective bargaining relationship" is present because then picketing is limited by § 8(b)(7) and thus no "loophole" is present (Board br 9-11).

Our certiorari petition in No. 81-91 and our supporting brief in No. 80-1808 confront directly each of these arguments made by the Board in *Shriver* and explain the serious shortcomings in the Board's analysis and the Board's serious misrepresentations of the law. Significantly, in its opposing brief herein the Board has elected to respond to these deficiencies in its position *by simply ignoring them.*

1. ***Complete protection of union wages and benefits can be accomplished by a primary union standards clause, without need for a subcontractor clause that forces subcontractors' employees to join the union.*** The Board argues here, just as it did in *Shriver,* that "the union members' interest in their employer's subcontracting practices goes well beyond the

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[1] *Donald Shriver, Inc. v. NLRB,* 635 F2d 859 (D.C. Cir 1980), cert den ___ US ___ (May 1, 1981) (Supreme Court docket No. 80-1257).

[2] *Connell Co. v. Plumbers Steamfitters,* 421 US 616 (1975).

narrow concern" of avoiding jobsite friction between union and nonunion workers, and because of the peculiarity of the construction industry, requires union signatory subcontractor clauses for "maintaining union wage levels" and "protecting benefits" (Board br 8, quoting opinion below). This latter interest, the Board argues, warrants the extension of proviso-protection to subcontractor clauses that do not serve to prevent jobsite friction and that do serve to force employees to accept union representation regardless of their wishes.

As we pointed out in our petition and our supporting brief, this argument ignores the settled doctrine that a union can protect its economic standards through a union standards subcontractor clause, which is primary and therefore needs no proviso-protection. By forbidding an employer to subcontract to a firm that does not meet union standards such a clause removes the incentive to subcontract as a means for undermining union standards; a general contractor bound by such a clause must assure that, whether he performs the work on his own or through a subcontractor, the employees are paid at the union standards level.

Through this primary, lawful device, union economic standards are protected without any violation of § 8(e) and without any employee being forced to join a union against his wishes.

The clause at issue here goes far beyond assuring that union wage and fringe benefit levels are maintained; it requires in addition that the subcontractor abide by all *noneconomic* provisions of the union's contract, including the union security clause, which requires all subcontractors' employees to join the union. Thus, this subcontractor clause forces employees of subcontractors to join the union whether they want to or not, in derogation of their rights of free choice protected by § 7 of the

Act.[3] This compulsory unionism is in no way required to serve the union's interest of "maintaining wage levels" and "protecting benefits" (Board br 8, quoting from opinion below), since those interests can be fully served by a union standards subcontractor clause. Nor does this compulsory unionism serve to avoid union-nonunion friction on the jobsite, since it is not confined to jobs where such friction can occur. Instead this compulsory unionism serves only to organize employees from the top down, contrary to Congress' "major aim" (*Connell*, 421 US at 616) of preventing such union tactics.

In its brief here the Board simply repeats the sweeping generalities of its *Shriver* brief and makes no attempt to come to grips with the fact that this clause's devastating effect on § 7 rights is wholly unnecessary to protect union standards. The Board's resort to conclusional assertions cannot mask the glaring flaws in its logic. Nor can the Board avoid this fundamental point by ignoring it.

2. *The jobsite friction rule does not require jobsite-by-jobsite negotiation of labor contracts and is readily administered under familiar NLRB principles*. The Board's argument here that a jobsite friction rule would generate "immense practical problems" simply repeats what it said in *Shriver* without addressing the deficiencies in that argument explained in our petition and brief. The Board persists in its baseless claim that a jobsite friction rule would necessitate "jobsite-by-jobsite negotiation of collective-bargaining contracts" (Board br 9). There is nothing in the jobsite friction rule that would force or even encourage construction unions and employers to abandon

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[3]Section 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

their present practice of negotiating wages, benefits, subcontracting restrictions and other terms of employment for a term of years and instead negotiating such terms separately for each job. The subcontracting clause in such a long-term agreement would apply only on those jobs where friction is a possibility.

The Board also repeats its argument that a jobsite friction clause would be difficult for unions to enforce; it makes no mention of the fact, explained in our petition and brief, that for decades the NLRB has permitted unions to picket construction jobsites only when employees of a primary employer are present[4] and thus has made the legality of such picketing turn on the presence or absence of particular employees on the jobsite, precisely the test required by the jobsite friction rule. The Board makes no effort to explain why the use of this test in determining the legality of a subcontractor clause presents "immense practical problems" when the same test has been used successfully for so many years in determining the legality of picket lines.

3. *The Board's "pattern of bargaining" argument is contrary to* Connell. The Board asserts as dogma, with no analysis, that the construction proviso was intended to preserve the 1959 pattern of bargaining (Board br 7), without even mentioning that the *Connell* Court dismissed this same argument, and without even mentioning the Board's earlier position that clauses of the type held illegal in *Connell* were a consistent and regular part of the 1959 "pattern" that the Board claims is preserved in the proviso (see our petition for certiorari, pp 9-10).[5] The Board's argument that all clauses which "were part

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[4]E.g. *Carpenters' Council of Milwaukie*, 196 NLRB 487, 490, No 60 (1972); *Local U. No. 519, United Ass'n of J. A. of Plumb., Etc. v. NLRB*, 416 F2d 1120, 1124-1126 (D.C. Cir 1969).

[5]The Board's General Counsel's acknowledgment that clauses of the type held illegal in *Connell* were "commonplace" in 1959 (see our petition for certiorari, pp 9-10) belies the unsupported assertion of the respondent unions that such clauses were "an entirely novel organizing device" with "no antecedent in the construction industry at the time of the 1959 amendments" (Mem for Resp Unions in Opp 3, note 3).

of that pattern" were preserved (Board br 7) is thus directly contrary to *Connell's* striking down of a clause that was part of that very pattern.[6]

4. Connell *is not a mere plug in a "loophole" in § 8(b)(7) but a bar to all top-down-organizing subcontractor clauses.* Finally, the Board repeats its argument that *Connell* merely closed a narrow loophole in § 8(b)(7) that left "stranger" unions free to picket employers to obtain subcontracting agreements. It fails even to address the legal principles which we discuss in our petition and brief showing that this claimed "loophole" for stranger unions is fictitious; in fact, § 8(b)(7) imposes no effective restraints on any union efforts to obtain subcontractor clauses, and this is so regardless of whether or not the picketing union is a "stranger." A union recognized by an employer can picket that employer indefinitely to force it to sign a union signatory subcontractor clause without violating § 8(b)(7) or any other provision. A union which has not been recognized can consistent with § 8(b)(7) engage in "informational picketing" indefinitely even though its ultimate objective is to force the employer to sign an agreement containing a union signatory subcontractor clause (see our certiorari petition, pp. 15-16).

Thus, whether or not "a collective bargaining relationship" exists, § 8(b)(7) does not effectively limit picketing to obtain subcontractor clauses; it follows that *Connell* cannot fairly be viewed as a mere plug for a supposed "loophole" in that statute. Its significance is broader. The ruling in *Connell* and the fair import of its language create a far more significant obstacle to such picketing than is raised by § 8(b)(7). Because under *Connell* union signatory subcontractor clauses that do not prevent jobsite friction violate § 8(e), picketing to obtain such a clause violates § 8(b)(4)(A).[7] Thus *Connell's* significance is not

[6]The respondent unions argue that the dissent below acknowledges that Senator Kennedy thought that the proviso would permit union signatory subcontractor clauses (Mem for Resp Unions in Opp 2, note 3), but the unions omit the dissent's conclusion that "most congressmen thought the proviso was intended to address the problems of jobsite friction" (Pet App in No. 80-1808, p 102).

[7]Section 8(b)(4)(A) prohibits picketing to secure a clause prohibited by § 8(e).

the mere plugging of a supposed loophole in § 8(b)(7), but instead the imposition of § 8(b)(4)(A) as a barrier to picketing intended to secure top-down-organizing subcontractor clauses.

The Board's brief studiously avoids meeting any of these points, which were all specifically addressed in our petition and supporting brief. Apparently the Board believes that its *Shriver* brief is a "winning formula" and that the best strategy in this case is to repeat the *Shriver* formula and ignore all contrary authority.

All agree that these issues are of vital importance to the entire construction industry. The only basis the Board urges for denying certiorari is that the majority's decision below was correct. Yet the Board has not even dared address any of the reasons we have set forth showing that the majority's decision is based on serious misstatements of basic labor law—misstatements which, we submit, the Board cannot defend so has elected to ignore. To ignore brings ignorance and prevents the full airing of issues required to assist this Court in ruling on questions of the magnitude of those presented by the petitions herein.

We urge that the Board's *Shriver* brief and its brief here rest on unsound legal premises, that for the reasons stated in our petition and supporting brief the Ninth Circuit's decision is contrary to *Connell*, and that certiorari should be granted to review these questions which all concede are of vital and far-reaching importance to construction industry labor relations.[8]

Respectfully submitted,
James H. Clarke
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[8]The list of related companies of the petitioner herein, required by Rule 28.1 of the Rules of the Supreme Court of the United States, is set forth in footnote 1 of the petition in No. 81-91.